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In the Supreme Court
OF THE
United States

OCTOBER TERM 1977

NO. 77-1197

WILFORD K. PULAWA, SR., also known as Nappy Pulawa; ALVIN GEORGE KAOHU; ROBERT R. WILSON, also known as Bobby Wilson; DANNETTE BEIRNE LEOTA, also known as Sister, and HENRY JAMES HANALEI HUIHUI, also known as Henry W. Huihui

Petitioners,

v.

STATE OF HAWAII

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of Hawaii, for which review is sought, is found in Appendix A of the Petition, pages i — xiii. The unpublished opinion of the Hawaii Supreme Court denying rehearing filed on December 6, 1977, is found in Appendix D of the Petition, pages xxvi — xxvii. The unpublished decision and amended order filed on June 2, 1975,

and the unpublished order filed on July 15, 1974, and oral opinion rendered on July 11, 1974, of the Circuit Court of the First Circuit, State of Hawaii, are found in Exhibits B and C, respectively, pages xiv — xxv.

JURISDICTION

The judgment of the Hawaii Supreme Court was entered on September 29, 1977, and rehearing was denied on December 6, 1977. The order remanding for trial was filed on January 7, 1978. The Petition for a Writ of Certiorari was filed on February 23, 1978. The jurisdiction of this Court rests upon 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Whether Petitioners may be retried after their original trial ended pursuant to the granting of their motion for mistrial?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On February 13, 1974, Petitioners were indicted for the crimes of kidnapping, conspiracy, and murder. Mr. Brook Hart represented Defendants Huihui, Leota, and Wilson. Mr. David Schutter represented Defendants Pulawa and Kaohu.

The jury trial of Petitioners commenced on April 29, 1974, and Respondent State of Hawaii rested its case on July 8,

1974. On July 2, 1974, Petitioners jointly filed a written motion for mistrial, asserting that prejudicial testimony had been elicited by Respondent. This motion for mistrial, along with other defense motions, was argued on July 10, 1974, and on July 11, 1974, the trial court dismissed the conspiracy counts on the ground that prosecution had been barred by the statute of limitations. The trial court also declared a mistrial as to the counts of murder and kidnapping contending that the admission of evidence relative to the dismissed conspiracy counts had prejudicially infected the proceeding as to the remaining counts in the indictment.

On April 21, 1975, Petitioners jointly filed a motion to dismiss the remaining counts on double jeopardy grounds, asserting that retrial would violate Article I, Section 8 of the Hawaii Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. The trial court granted the motion as to Petitioners Pulawa and Kaohu, but denied the motion as to Petitioners Huihui, Leota, and Wilson, finding that they did consent to the declaration of the mistrial.

The Hawaii Supreme Court, on September 29, 1977, reversed the trial court's ruling as to Petitioners Pulawa and Kaohu and affirmed as to Petitioners Huihui, Leota, and Wilson. The Hawaii Supreme Court, after a review of the record below, found that Petitioners had jointly moved and argued for mistrial:

> This motion for mistrial, with other defense motions, was heard on July 10, 1974, after the State had rested its case. Mr. Schutter argued for the motion for mistrial, and on at least two occasions Mr. Hart was asked by the court if he joined in Mr. Schutter's motion for mistrial. Both times Mr. Hart replied in the affirmative. The trial court took the various motions under advisement, and on July 11, 1974, announced its rulings. The motion for mistrial was granted and it was Mr. Schutter who prepared the order 'granting motion for mistrial,' which was filed on July 15, 1974.
>
> The order terminating the prosecution was clearly in response to a motion made by the defendants. . . . Having moved for a mistrial, and the trial court having considered their request and declared a mistrial, defendants Pulawa and Kaohu cannot now be heard to complain that the termination of the prosecu-

tion was without their consent. [Petitioners' Appendix A, hereinafter "A.", vi – vii; footnote omitted.]

The Hawaii Supreme Court, after review of the record, concluded that there was no prosecutorial overreaching in this case:

> We have examined the record, including the transcript of the proceedings in the circuit court, and have come to the conclusion that there was no prosecutorial overreaching in this case. The prosecution obviously erred in its assessment of the evidence available to support the formal charges of conspiracy. This error was compounded by its faulty interpretation of the applicable statute of limitations. But there was no deliberate misconduct in the charging of the conspiracy offenses. At worst, there might have been prosecutorial negligence involved. But simple negligence falls far short of the prosecutorial overreaching requisite to the imposition of the double jeopardy prohibition to a retrial. [A. x – xi; footnote omitted.]

In response to Petitioners' argument that Respondent deliberately attempted to gain an unfair advantage at trial by charging conspiracy in order to present highly prejudicial and incompetent evidence in the nature of hearsay and double hearsay, the Hawaii Supreme Court ruled that such evidence and testimony relating to conspiracy was admissible and it made no difference whether the conspiracy to commit these crimes was formally charged. (A. xi – xii.)

> The prosecution is generally entitled to show the entire history of a conspiracy to commit crimes, including the substantive crimes charged from the time of its inception until its consummation. *Territory* v. *Blackman*, *supra*; *Territory* v. *Kitabayashi*, 41 Haw. 428, 434 – 436 (1956). It is entitled to adduce evidence of declarations made by a co-conspirator pursuant to and in furtherance of the conspiracy. Such declarations are admissible against the other conspirators. *State* v. *Yoshino*, 45 Haw. 206, 364 P. 2d 638 (1961); *Territory* v. *Blackman*, *supra*; *Territory* v. *Kitabayashi*, *supra*. Defendant Pulawa's declarations fall into this category. [A. xii.]

The Hawaii Supreme Court, although they were not called upon to decide the propriety of the separate evidentiary rulings of the trial court, went on to state that "much of this evidence was admissible with respect to the substantive crimes charged .... If error was committed in the

reception of certain of the evidence, it was judicial error. There was no judicial overreaching in this case, and none has been charged." (A. xii – xiii.)

Petitioners filed with the Hawaii Supreme Court a Petition for Rehearing which was denied on December 6, 1977, and the order remanding for trial was filed on January 7, 1978.

ARGUMENT

A. PETITIONERS' MOTION FOR MISTRIAL REMOVED ANY BARRIER TO REPROSECUTION.

The Fifth Amendment to the United States Constitution provides that "no person shall ... be subject for the same offense to be twice put in jeopardy of life and limb." This provision was made applicable to the States in the decision of *Benton* v. *Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). The Hawaii Constitution, Article I, Section 8, contains a similar provision.

The mandate of the Double Jeopardy Clause adds a measure of finality to criminal proceedings and protects a defendant from being subjected to repeated attempts at conviction, embarrassment, expense, and ordeal. *Green* v. *United States*, 355 U.S. 184, 187 – 88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). However, the double jeopardy provision of the Fifth Amendment does not provide that every time a defendant is put to trial he is entitled to go free if such trial fails to end in a final judgment.

> The double jeopardy provision of the Fifth Amendment ... does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double jeopardy prohibitin is aimed ... what has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments. [*Wade* v. *Hunter*, 336 U.S. 684, 688, 689, 69 S.Ct. 834, 93 L.Ed. 974 (1949); cited with approval, *Gori* v. *United States*, 367 U.S. 364, 367, 368, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961).]

The Double Jeopardy Clause does not guarantee a defendant "a single proceeding free from harmful governmental or judicial error." *United States* v. *Jorn*, 400 U.S. 470, 483 — 84, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971).

In deciding whether the Double Jeopardy Clause bars retrial of a defendant after a mistrial declaration, a distinction has been drawn between cases where mistrials are declared *sua sponte* by the court and cases where mistrials are granted at the defendant's request or with his consent. *United States* v. *Martin*, 561 F.2d 135, 138 (8th Cir. 1977).

In circumstances where a mistrial is declared by the court on its own motion, the defedant is precluded from deciding whether to remove the case from the jury. In those instances the issue upon review focuses upon the question of whether there was manifest necessity "for the mistrial." *United States* v. *Jorn*, *supra*, 400 U.S. at 480 — 81.

In the case *sub judice* there was no *sua sponte* declaration of mistrial by the court. The record below, as reviewed by the Hawaii Supreme Court, revealed that the declaration of mistrial was moved for by the Petitioners.

Different considerations must therefore lie when a mistrial is declared at the defendant's request. The Double Jeopardy Clause does not bar reprosecution where the defendant has requested a mistrial. *Lee* v. *United States*, ___ U.S. ___, ___ , 97 S.Ct. 2141, 53 L.Ed.2d 80 (1977); *United States* v. *Jorn*, *supra*, 400 U.S. at 485.

> [W]here circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error. [*United States* v. *Jorn*, *supra*, 400 U.S. at 485.]

This principle reflects the double jeopardy consideration that a defendant be allowed to "retain primary control over the course to be followed in the event of such [judicial or prosecutorial]error." *United States* v. *Dinitz*, 424 U.S. 600, 609, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). The rationale is that if the trial had gone to completion and a conviction were returned, an appeal and reversal of that conviction would have allowed for a second trial to be had. In that instance it would

serve no purpose in requiring a defendant to continue with a trial infected with error which would result in a conviction, appeal, reversal, and retrial. The choice, however, remains with the defendant. He may opt for mistrial and a new trial, or he may nonetheless desire to go with the first jury hoping, at best, for an acquittal, but at the same time, realizing the likelihood of conviction, appeal and retrial.

Petitioners in this case had the option to proceed to verdict or to request a mistrial. They chose the latter, and their request for a mistrial, which was honored by the court, removed any barrier to reprosecution.

However, a request for mistrial does not automatically forestall the application of the Double Jeopardy Clause. This Honorable Court has recognized in *United States* v. *Jorn*, *supra*, and *United States* v. *Dinitz*, *supra*, limited circumstances where a defendant's mistrial request does not remove the double jeopardy bar. In those cases where the defendant is prompted by judicial or prosecutorial overreaching into requesting a mistrial and his motion is granted, retrial for the same offense is prohibited.

> Where 'prosecutorial overreaching' exists, a defendant's mistrial request does not remove the constitutional double jeopardy barrier to a retrial. In such a case, the mere fact that the defendant requested a mistrial is not controlling.
>
> Where 'prosecutorial overreaching' is present, the interests protected by the double jeopardy clause outweigh the public interest in conducting a second trial ending in acquittal or conviction. [*United States* v. *Kessler*, 530 F.2d 1246, 1255 — 56 (5th Cir. 1976); footnote omitted.]

B. THE RECORD BELOW IS DEVOID OF ANY JUDICIAL OR PROSECUTORIAL OVERREACHING SUFFICIENT TO BAR RETRIAL OF PETITIONERS.

Once a defendant's request for mistrial or consent to mistrial is demonstrated, the issue then shifts to whether such request is the direct and concomitant result of judicial or prosecutorial overreaching.

The Hawaii Supreme Court found no evidence of judicial overreaching, nor was judicial overreaching alleged by Petitioners in their Petition. The only remaining question is whether

prosecutorial overreaching had occurred.

In approaching the issue of prosecutorial overreaching a two-pronged objective/subjective test should be applied. First, the record should be examined to determine what was the alleged prosecutorial error, and whether such error was prejudicial to the defendant. And, second, if prosecutorial error is found and found to be prejudicial to the defendant, was it motivated by bad faith and was it intentional misconduct on the part of the prosecution. The first prong of this test for overreaching looks for and considers the objective indicia of prejudice to the defendant, and the second prong reviews the subjective motivation of the overreaching party. *See People* v. *Baca*, ___ Colo. ___ , 562 P.2d 411, 414 (1977).

In this case Petitioners were charged with the offenses of murder, kidnapping, and conspiracy. Petitioners' assignment of error was that the formal charge of conspiracy was barred by the applicable statute of limitations. Petitioners claim that they were seriously prejudiced in their defense to the remaining charges, inasmuch as certain prejudicial hearsay statements relating to the conspiracy charge were presented before the jury. Was it error for the prosecution to have charged conspiracy and was that error prejudicial to Petitioners?

On the question of error, the Hawaii Supreme Court, after reviewing the record, found the following:

> The prosecution obviously erred in its assessment of the evidence available to support the formal charges of conspiracy. This error was compounded by its faulty interpretation of the applicable statute of limitations. [A. xi.]

Assuming there was error in charging conspiracy, was this error prejudicial to Petitioners?The Hawaii Supreme Court found no prejudice to Petitioners. The so called prejudicial hearsay statements would have been admissible relative to the substantive crimes charged regardless of whether conspiracy had been formally charged. The Hawaii Supreme Court stated:

> [T]he rule is that a conspiracy may always be shown as an evidentiary fact to prove participation in the substantive crime, and a formal charge in the indictment is not a necessary predicate to the admissibility of facts and circumstances showing the existence of a conspiracy to commit the principal offense charged. The law is clear in this regard. *See Territory* v. *Blackman*, 32 Haw. 460, 464 – 466 (1932); *State* v. *Yoshino*, 45 Haw. 640, 372 P.2d 208 (1962); *Territory* v. *Goto*, 27 Haw. 65 (1923); 16 Am.Jur.2d, *Conspiracy*, § 37. The charges of conspiracy in this case were directed towards the substantive crimes for which the defendants were also charged in the indictment. It would make no difference, therefore, on the question of evidentiary admissibility whether or not conspiracy to commit these particular offenses was formally charged. [A. xi – xii.]

The Hawaii Supreme Court, after examining the record, further stated: "[W]e are constrained to observe that much of this evidence was admissible with respect to the substantive crimes charged." (A. xiii.)

Assuming there was error in charging conspiracy beyond the statute of limitations, this error did not prejudice Petitioners relative to the remaining murder and kidnapping charges.

The increased likelihood of conviction was the motivating factor for Petitioners to request a mistrial; but that increased likelihood was not the result of any undue influence by the prosecution, but rather the result of the greater weight of evidence being against the Petitioners. Because the alleged prosecutorial error did not prejudice Petitioners, there was no prosecutorial overreaching and retrial is not barred.

In reference to the second part of this test, without a finding of prejudice to the Petitioners, this Honorable Court need not consider the second prong which relates to the subjective motivation of the overreaching party. However, if prejudice had been found, this Honorable Court would find that the underlying error was not "motivated by bad faith or undertaken to harass or prejudice" the Petitioners. *United States* v. *Dinitz*, *supra*, 424 U.S. at 611; *Lee* v. *United States*, *supra*, ___ U.S. at ___ , 97 S.Ct. 2141.

The Hawaii Supreme Court found no deliberate misconduct in the charging of conspiracy.

> [T]here was no deliberate misconduct in the charging of the conspiracy offenses. At worst, there might have been prosecutorial negligence involved. But simple negligence falls far short of the prosecutorial overreaching requisite to the imposition of the double jeopardy prohibition to a retrial. *Muller* v. *State*, 478 P.2d 822 (Alaska 1971); *United States* v. *Beasley*, 479 F.2d 1124

(5th Cir.) *cert. denied* 414 U.S. 924, *reh. denied* 414 U.S. 1052 (1973). [A. xi.]

The Hawaii Supreme Court felt that the prosecution may have erred in assessing the evidence available to support the charge of conspiracy compounded with a faulty interpretation of the applicable statute of limitations. [A. xi.] However, this error was not intentional, nor did it constitute gross negligence.

A review of the record below would show that the two prosecutors who prepared the indictment had different theories as to the charging of conspiracy relative to the applicable statute of limitation.[1] They felt, however, that even if conspiracy were not charged, the evidence of conspiracy would have been admissible anyway.[2] The third prosecutor who took

[1] Deputy Prosecutors Michael Weight and Douglas Halsted drafted the indictment. The following statements are from the transcript of the motion to dismiss:

p. 648 [Weight]

A. It was my theory of the case that the conspiracy was in effect, a net effect, an umbrella containing under it the various counts of kidnapping and murder and that the conspiracy was a continuing one, including the concealment phase which did not end on the beach at Mokuleia. It continued on after that, by my theory of the case, including concealment and it was not until late 1973 that this crime came to light.

p. 693 [Halsted]

A. I'll put it this way. I was aware that so far as the theory of the case appeared that the incidents that were being charged happened during February 1970, and that we were, what, in 1973, 1974. I first considered that the so-called old law would apply. That's in Volume 7 of HRS, not the penal code in terms of time limitations. And if you read the section, I can't remember, it's in the 700's of the old HRS, they set out different time limits or there's one paragraph, statute of limitations. The way they do it, they do it negatively. They give you a number of exceptions where the statute doesn't apply. And I had thought that conspiracy charge could be fitted in under what's called compounding offense punishable by life.

[2] p. 676 [Weight]

A. I was aware of this. I was aware that you could either charge conspiracy and proceed on a conspiracy theory or you could not charge conspiracy but still proceed on a conspiracy theory and get the same evidence in. I was aware of that. I felt at the time that in charging the conspiracy it more accurately pictured the crimes that were committed in the course of what happened in February of 1970.

the case to trial was not aware of the statute of limitations problem until raised by the Petitioners at the end of the State's case.[3]

The kinds of prosecutorial misconduct abhorred by the strictures set forth in *United States* v. *Dinitz*, *supra*; *United States* v. *Jorn*, *supra*; *United States* v. *Kessler*, *supra*; and *United States* v. *Martin*, *supra*; are those which relate to actions taken by the prosecutor *during* the trial of a defendant. Concern was expressed for the over zealous prosecutor who resorts to improper methods which may produce a wrongful conviction. *Berger* v. *United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314, 1321 (1935). So to, for the prosecutor who does some act which is calculated to abort a trial which is going badly in order to avoid an acquittal and allow for a second chance at conviction.

The alleged error in the case *sub judice* occurred *prior* to trial. It did not occur during trial in order to obtain a wrongful conviction or to avoid an acquittal. It occurred at a time when a mistrial could not have been foreseen or calculated for. It also occurred at a time when the trial court or the Petitioners themselves could have remedied the error. However, the prosecutor, the court, and the Petitioners themselves, "overlooked it."[4] There was no showing of any intent on the part of the prosecution prior to trial to harass Petitioners or to subject

[3] Deputy Prosecutor Lawrence Grean presented the State's case at the time of trial.

p. 718 [Grean]

A. The only time I became familiar with the statute of limitations in connection with this case was when it was raised by Mr. Hart [defense co-counsel], and, at the end of trial. That is when it first dawned on me.

[4] Attorney Brook Hart, representing Petitioners Huihui, Leota, and Wilson, from the transcript of the motion for mistrial.

p. 565 [Mr. Hart]

Now, perhaps counsel should be admonished for not having done so earlier [moved to dismiss the conspiracy charge]and if we are so admonished, we stand so. We overlooked it [the statute of limitations relating to the conspiracy charge.]But Mr. Grean says they should have done it earlier, we agree. We probably should have found it earlier but we didn't.

them to repeated prosecutions. There was no deliberate or intentional misconduct, no gross negligence, and no prosecutorial overreaching.

The standard in finding "prosecutorial overreaching" is succinctly set forth in *United States* v. *Kessler*, *supra*, 530 F.2d at 1256:

> To find 'prosecutorial overreaching,' the Government must have, through 'gross negligence or intentional misconduct,' caused aggravated circumstances to develop which 'seriously prejudice[d] a defendant' causing him to 'reasonably conclude that a continuation of the tainted proceeding would result in a conviction.' *United States* v. *Dinitz*, *supra*, ___ U.S. at ___, 96 S.Ct. at 1080, 47 L.Ed.2d at 274, 44 U.S.L.W. at 4312.

In the case *sub judice* there was no prosecutorial overreaching. There was no gross negligence or intentional misconduct, and no aggravated circumstances which seriously prejudiced Petitioners. The conclusion that Petitioners reached as to the likelihood of their conviction was based upon the greater weight of evidence against them rather than any improper actions of the prosecutor. In this instance, their request for a mistrial removes any barrier to reprosecution.

CONCLUSION

For the reasons set forth above, we respectfully submit that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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